

Thomas M. James

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FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION

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SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

United States District Court
Southern District of Indiana
Indianapolis Division

Thomas M. James,
Plaintiff,

v.

Dr. Nicolas Villanastre,

Dr. Lorenzo Eli, et. al.,

And All Others Acting In

Concert, (ABC-XYZ, corp.),

Respondents.

NO: 1:13-CV-541-WTL-TAB.

Plaintiff's Brief In Support
Of Summary Judgment Motion
Rule 56, Fed. R. Civ. Proc.

Hon. William T. Lawrence, Judge.

Comes Now, plaintiff and hereby submits his delayed response, brief in support of summary judgment motion on defendant Dr. Villanastre claims and demands submitted on 1/28/2014.

I. Statement of material Facts under Dispute:

Plaintiff submits that all times and details to his visit to wishard hospital care are correct, as submitted by defendant villanustre in brief in support at: pg. #1, to pg. #2; plaintiff contends that a dispute still exists under performance measure for emergency care for serious injury is primary concern under standard for deliberate indifference, because professional - judgment by doctor is shown in various ways, as is argued below. See also, (Plaintiff Summary Judgment Motion at pg. #3, & pg. #4). And see Affidavit of Thomas M. James, #98106, at (Appendix, Attachment - #1, enclosure #1, see sections, #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11 - all recite how injury to toenail had created fall down steps, see #11, #12, #13, - delays in treatment for emergency care for serious injury, §14, #15 - on point to this claim on delays, §16, and §17 - the continuing complication of medical judgment and it's after effects long standing problems that affects over all quality of life daily, #18, - Dr. Quin's statement of "Non-Treatment" Supra, #19 - non-compliance with care caused plaintiff to have all teeth removed and injury impediment prevents convention denture to be used appropriately, #20, #21, #22, #23, #24, #25).

Plaintiff further submits that his contentions all along were based on evidence that delays occurred with his medical treatment is proof of deliberate indifference.

II. Summary Judgment Standard/ Deliberate Indifference.

The role of a judge at Summary Judgment stage is not to weight evidence, but to determine whether there is genuine issue of material fact. See City Management Corp. - v - U.S. Chemical Co. Inc., 43 F.3d 244 (6th cir. 1994). Dismissal of summary judgment is harsh penalty and therefore, should only be imposed in extreme circumstances. Hernandez - v - City of EL Monte, 138 F.3d 393 (9th cir 1998).

Deliberate Indifference by prison personnel or [a] person contracted by [prison] to an inmate's serious injury constitutes cruel and unusual punishment under the eighth Amendment. Estelle - v - Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976). Deliberate indifference consists of [prison] doctor (Dr. Eli) in there delayed response to plaintiff's injury and/or has delayed access to emergency treatment and/or interfering with a prescribed treatment upon being timely, the inmates constitutional rights are violated. Dr. Villanustre unexplained delay of week to do follow-up care for serious injury states a prima facie case of deliberate indifference. Brown - v - Hughes, 894 F.2d 1533, 1538 (11th cir. 1990), "Four hour delay in treating broken foot" cert. denied, 110 S.Ct. 2624 (1990). Robinson - v - Moreland, 655 F.2d 887, 889-90 (8th - cir. 1981), "weekend's delay in treating broken hand constitutes deliberate indifference."

Summary Judgment is appropriate when the facts are not in dispute and the moving party is entitled to summary judgment as a matter of law. See Orme School - v - Reeves, 166 Amz. 301, 802 P.2d 1000 (1990). "motions for summary judgment should be entertained where the pleadings, depositions, and admissions on file, together with the defendant's affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact". Northern - v - Elledge, 72 Amz. 166, 170, 232 P.2d 111, 113 (1951); Baugus - v - Brunson, 890 F. Supp. 908 (E.D. Cal. 1995); Tolentino - v - Friedman, 46 F.3d 645 (7th Cir. 1995), "Summary Judgment is not granted, unless there are no triable issues." See also Rule 56(c), Fed. R. Civ. Proc. Plaintiff submits his Appendix- Attachment #1 to #6 as in those "attachments" are genuine sufficient evidence that will permit a reasonable jury to grant relief in plaintiff's favor. Anderson - v - Liberty Lobby Inc., 477 U.S. 242, 249, 252 (1986); Karatzanos - v - Navistar Int'l Trans Corp., 948 F.2d 332, 338 (7th Cir. 1991).

III. The Burden of Default to File Timely Response to Defendant's Motion for Summary Judgment is constituent to Interference by (A.O.O.C.).

§A)

Plaintiff contends that the constraint on his -

-ability to move freely on high-level-3-yard at: ASPC-
mobile unit, can be constative by this court upon
evidence relating to retaliation claim which has
been on going in this action to prevent plaintiff
from filing and/or formulating timely grievance
process, is a delay, as found at: (Appendix-
-attachment #5, enclosure #1, see documents in
section thereto, Doc. #1 to Doc. #98). See
Crawford-El-v-Britton, 523 U.S. 574 (1998). Here,
plaintiff has shown evidence in Appendix, att. #5,
which is clear and convincing evidence that the
grievance process has taken over a year to be final.
See (Appendix, Attachment-#4, at: enclosure #4, #5, #6,
#7 - "claim the truth of the matter plaintiff did not get in
a fight"). Simply put, the record of the evidence
support plaintiff's allegation of retaliation on him
by (A.D.O.C.) staff is long standing. The constitutional
claim is interfering to self representation and to
Access to the Courts. Benavides-v-Bureau of Prisons,
993 F.2d 257 (D.C. Cir. 1993). Because this underlying
claim can be established, plaintiff further contends
that retaliation contributed to filing a timely response
to defendant's summary judgment motion, to "put up
or shut up" and based on defendant failing to
disclose all requests to production of documents, &
interrogatories, (Id.) (Appendix-Att. #1, enclosure #7, at:
pg. #2, #3); Farmer-v-Brennan, 511 U.S. 825 (1994) -
claim, and because between July and September-

- of 2014- plaintiff was subjected to stick lock-downs, on his prison-unit ordered by administration to do "Shake-Downs" on three different events, that had happened at three different times - and during those shake downs - plaintiff's legal property - some of it, was seized, and then later was order by A.D.W. to hand over property box's during en/ar before and time to file his response, supra.

Plaintiff's condition of confinement played a roll in responding to defendant's motion and "he" has alerted the court on these subjects, where the court has not cited its opinion.

Plaintiff contends that because there is a strong presumption of evidence to prove deliberate indifference here with this defendant, it would not surprise plaintiff that the taking of legal material here was done to prevent plaintiff from filing a timely response. Dr. Quantia knows that there is a substantial risk of serious harm later in life for plaintiff because he was not treated appropriately at wishard hospital. Dr. Villanovestre is a professional and knows this risk as well. See (Appendix-attachment-#5, Enclosure #1, Doc. #43; see also M.R.T. at wishard hospital- enclosure #2, the clean cut brake at that time could be repaired, but the cat-scans later taken show build-up on the bone - cause's a complex problem to perform surgery - is consistent with irreparable injury). This is a dispute that plaintiff would prevail at trial.

It is also known to this Court, neither Dr. defendant Eli or Villanustre complied with discovery orders to disclose all of Dr. Quintia's medical records on plaintiff, as mainly requested under dispute, to view Dr. Quintia's "cat-scans" on plaintiff to show them as evidence to support "untreated broken-bone" and now "irreparable injury", with life long future complications for plaintiff. under these standards of Statutory Tolling / equitable Tolling, this court may grant conditional relief and reach the merits of plaintiff untimely response to Summary Judgment. Anderson, 477 U.S. at 256. And see West-v- Atkins, 487 U.S. 42, 50-52 (1988). "Physician acted under color of state law when providing medical services to prisoner." See also (Plaintiff's Reply, Filed on: 12/30/2014, Subject matter both Dr. defendant's failed to comply with discovery disclosing order by this Court, Rule 37, Rule 60, Rule 62, Rule 55, Fed. R. Civ. Proce). The subject not disclosed is Dr. Quintia's "cat-scans for viewing" and inspection by plaintiff and Court. (I.d.) see also, (Appendix-attachment #4, enclosure #6). And see (I.d.) (enclosure #8, Freedom of Information Act-non-compliance - news clip). To be fairly presented, all discovery disputes trump rulings on summary judgment orders, and for that alone, the Court may reverse it's order granting Dr. Villanustre Summary Judgment to reach a conclusion on the -

- Plaintiff motion for Summary Judgment in his favor.

3B). Statutory Tolling.

Plaintiff's request to reverse defendant's order grant Summary Judgment can be done, and simply put, the request consists of the Court applying statutory Tolling; First because his requests come with evidences of interference by Ar. State officials for a long period of time; and Second, and most importantly, to [be] a "predicated" on plaintiff's discovery requests that have not been Fulfilled. Dr. Quintias evidence in cat-scans will proffer to support plaintiff's claim of deliberate indifference second the "Ugly" after effects, disfigurement and had caused an irreparable injury, and once the court can see both the original M.R.I. together, and/or "next to cat-scans done years later", the Court will conclude the same.

Accordingly, this Court may warrant conditional relief by reversing it's own order (l.d.) (Appendix- Attachment #1, enclosure #6), because based on the evidences presented herein plaintiff is entitled to Statutory Tolling.

3C). Equitable Tolling.

Because plaintiff is entitled to a fair discover and disclosure process, he is -

- then entitled to Statutory tolling upon said evidences, (l.d.) supra, the court can consider together, whether Plaintiff is entitled to equitable tolling. Plaintiff submits he is entitled to equitable tolling on these subjects. Equitable tolling is available only when "Extraordinary circumstances beyond a prisoner's control make it impossible to file a document [petition, motion, Reply] on time". Calderon-v-U.S. District Ct. (Kelly), 143 F.3d 530, 541 (9th cir. 1998). "When external forces, rather than a [petitioners] lack of diligence, account for failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate". In Miranda-v-Castro, 292 F.3d 1063, 1066 (9th cir. 2002), the ninth Circuit found extraordinary circumstances, are rare and generally limited to those in which a "Serious mistake by a government official" or "Counsel of Record" or "Court prejudiced the plaintiff". See e.g. Harris-v-Carter, 515 F.3d 1051, 1054-57 (9th cir. 2008).

Plaintiff only requests the Court to grant equitable tolling to this matter to reach the merits of the Summary Judgment in this case with all disclosures in evidence, so the Court may make an informed conclusion on the case, whether or not to set it for trial. Farmer-v-Brenann, supra, Anderson, supra.

§D) Delayed Discovery.

Statutory, & equitable Tolling is applicable to delayed discovery disputes. The concept of delayed discovery has most frequently been applied in cases of medical (legal) malpractice. Kenyon-v-Hammer, 142 Ariz. 69 688 P.2d 961 (1984). The application of delayed discovery is sound when the court applies standard to this present case. Here, plaintiff's contention all along has been under the standard of care titled "objective serious medical need". An objective serious medical need is "one that has been diagnosed by a physician as mandating treatment

or one that is so obvious" that even a lay person would easily recognize the necessity for a doctor's attention". See Zentmyer-v-Kendall County Illinois, 220 F.3d 805, 810 (7th Cir. 2000), quoting, Gutierrez-v-Peters, 111 F.3d 1364, 1373 (7th Cir. 1997).

And see Farmer-v-Brennan, 511 U.S. 825, 836 (1994) - "Requires the prisoner to show that the prison official was subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed to the prisoners health and safety". (Id.) at: 837; Zentmyer, 220 F.3d at 811. Both Dr. Eli and Dr. Villanstra were aware of the seriousness of plaintiff's injury -

and were aware of making a timely diagnoses in compliance with performance measures that apply to "emergency - and - urgent care provisions" set in place under state, ^{and} federal law and policy's thereto - "and Dr. Villanustre diagnosed a professional judgment call, not to treat plaintiff"

Plaintiff can support the ugly after effects of non-treatment with Dr. Quintia's Cat-scans, this is why they were never disclosed. Dr. Villanustre is therefore in default of plaintiff request for discovery- disclosure, Rule 55, supra. Because the plaintiff can establish ground to move for a trial under Rule 56, interference on plaintiff helped defendant to win on Summary Judgment by (A.D.O.C.) staff because of diversity Jurisdictional matters will play a part of any settlement on defendants accord (A.D.O.C.) whom Insurance is covering plaintiff. Farmer-v- Brennan, supra controls discovery requests, the plaintiff formally requested for said disclosure from defendant, objected to when defendant failed to disclose requests and this could be an oversight by the court. (Id.) (App. - Att. #1, enclosure #2). Equitable Tolling is appropriate here so plaintiff may acquire "Quintia's Cat-Scans for Viewing as Exhibits" in this case, to resolve these on going disputes and controversies. See Eisler-v- United States, 338 U.S. 189, 194, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949). "on going controversies are not moot"

III. Tort Law.

Plaintiff submits 42 USC § 1983 claims are either contract or tort. See (Plaintiff motion for Summary Judgment at: pg. #4). Here, (T.D.O.I.) breached it's contract with plaintiff, (C.C.C.P.) (Geo Group Inc.) (CMS) (Wishard Hospital) and of course (A.D.O.C.) by failing to alert said parties they are not covered in the political subdivision group - as told to plaintiff when he filed his notice to claim with (T.D.O.I.). A holder of Insurance upon a claim filed with evidence to prove injury is under a mandatory offering, and by this the parties above are in violation to said coverage because said coverage for injury's should be part of contract. See (Appendix - Attachment #3, The Contract, (T.D.O.C.) with (A.D.O.C.) supra all parties in interest & here to, see contract at: pg. #26, § 46, to pg. #30). "Insurance covers independent contractors".

OR all this can just look good on paper because it is a lie. So any decision as to which statute of limitations applies to an action is a matter of law. Hall-v-Romero, 141 Az. 120, 127, 685 P.2d 757, 764 (Ct.-App. 1984). Here the general rule is that the statute of limitations applicable to contracts governs actions based on Insurance policies. Transnational Inc. Co.-v-Simmons, 19 Amz. App. 354, 507 P.2d 693 (1973).

When the issue involves procedural law only, courts are liberal in allowing the plaintiff to choose, and thus, in upholding the action -

- in §1983 complaints in tort or contract. W. Prosser
& W. Keeton, The Law of Torts §92 at 666 -
(5th ed. 1984). When a tortious wrong also amounts
to a breach of contract, and as here the plaintiff
sues for this breach of contract, his tort remedy
is not barred merely because his breach of
contract by Dr. Villanustre is barred or denied;
See Ant. what Statute of Limitation Governs Action
by Contractee for Defective or Improper performance
of work by private Building Contractors, 1 A.L.R.
-3d 914, 916-17 (1965). Because the six year statute
of limitation applies to an insured breach of
contract action, against a defendant's performance
under contract, as subcontractor, and (I.D.O.I) Before
to make an offer, plaintiff respectfully requests that
if this Court does not reverse this order, to afford
plaintiff opportunity to sue under Federal Tort Act.
Federal Jurisdiction 28 U.S.C. §1367, see Felder - v -
- Casey (S.Ct. 1998).

IV. Defendant Dr. Villanustre Argument in His
Summary Judgment Motion is Erroneous;
mischaracterizes Plaintiff Delay claim;
Confuses standing in Clarifying Deliberate
Indifference Standard As a matter of law.

Argument:

Plaintiff objects to defendant's argument at:
Defendant's Villanustre's Motion For Summary Judgment -

- Filed on: 1/28/14 at: pg #3, to pg #6. Although the part of the laws cited by defendant are correctly presented, his lawyer's creative interpretation is incorrect, on the complete interpretation of deliberate indifference standard under the law. (I.d.) (at pg. #5 to pg #6); the sole conclusion of Dr. Villanustre's examination is based on a Judgment Call not to treat plaintiff. (I.d.) pg #6.

Under the complete usage of deliberate indifference standard, the main part of the claim, "was plaintiff timely seen by Dr. Villanustre", and "did his Judgment call to not give plaintiff treatment to repair his broken jaw bone reasonable", and "will this non-treatment be so blatantly inappropriate as to seriously aggravate plaintiff condition of his health in the future". Yes it has and is still affecting plaintiff's quality of life. See (Appendix-Attachment #1, enclosure #1, at pg #6, §16 and at pg. - #7, §17 - "Affidavit of Thomas M. James, #98106").

First and foremost, just because Dr. - Villanustre was following his job description to do examination on James and did all the work-up, to make a judgment based on those examinations, and he was "nice" to plaintiff while he was doing it does not effect the matter of fact that his Judgment after an examination was to not treat plaintiff - "during the narrow time-line, before the injury becomes irreparable". Because the injury now is irreparable -

- the judgment call is relevant, and is so blatantly inappropriate as to evidence in defendant's own exhibits attached to his Summary Judgment motion - "show intentional and wilful mistreatment - with-out explanation of cause, & effect if he didn't do the Surgery. [because at that time he was the only doctor to correct the broken bone (injury) in narrow time-line before injury created complications and/or becomes irreparable] Dr. Villanustre, as a professional, knew the outcome if plaintiff did not get his broken jaw bone repaired, and by his actions to not treat plaintiff will seriously aggravate and affect plaintiff's quality of life conditions from that point on, to every day after words, for the rest of his life. Dr. Villanustre's judgment to not treat plaintiff's broken jaw bone "in the narrow-time-line to do repair" created irreparable injury, pain and suffering, loss of enjoyment with eating, etc. etc. is/and was a judgment call to be deliberately indifferent to plaintiff quality of life that will never change. (L.d.) see (Standard of Review on deliberate indifference at - plaintiff's motion for Summary Judgment on: pg. #3). Plaintiff also submits that both Dr. Eli and Dr. Villanustre are in violation to treatment under the U.S. Constitution for delaying and/or in non-compliance to performance measures. Simply put, Dr. Eli knew about the injury on 12/27/07, but did not set up a meeting to see outside doctor for 6 days after he found out. See (Appendix -

- Attachment #4, at enclosure #1, #2, #3 is 12/27/07 H&R)
[after cms ignoring 3 prior requests with H&R's to
medical at (n.c.c.f.) (l.d.); see also enclosure #7, at
Exhibit A - states date and time finally see by Hospital
Doctor, specialist J. Dr. Eli's motion for Summary
Judgment Response will be filed on 1/15/2015.

Under the provision in Parsons-v-Ryan,
primary jurisdiction when plaintiff was in Indiana
at (n.c.c.f.) was afforded to (n.o.o.c.). Plaintiff was
located at ASPC-Douglas before he was forcibly re-lit-
-ed to (n.c.c.f.) and ended up back at Douglas complex.
See (Appendix - Attachment #3, at enclosure #5, see
Exhibit B, C, access to care, #25, #37, #40, #41);
see mainly guideline to urgent provider referrals are
seen by a Medical Provider within 24 hours of the
referrals. (l.d.) Exh. B, #40). The evidence supports
Dr. Eli created delay problems and after provider seen
James on 12/29/07 - Two days later, set-up a X-
-ray nearly a week later. This affected the
time-line to emergency treatment - which was not
important to (cms) medical or Dr. Eli. Finally, the
plaintiff, nearly a month later see Dr. Villanueva
on 1/2/08 - and after examination, denied treatment,
claiming it has been too long since injury occurred.

Unexplained delays of days in treating
serious injuries states a prima facie case on deliberate
indifference case. See Brown-v-Huges, supra at:
(plaintiff summary judgment motion (l.d.) pg #3).

And as mentioned above in this brief at § I, and at § II, Dr. Quinter's examination stated non-treatment (i.e.) (Appendix- Attachment #5, enclosure #1, at Doc. #43), clarifies a dispute with on going complications and clarifying complications if surgery is done now, is in support of irreparable injury - and it would be in the interests of justice to do deposition on Dr. Quinter, and disclose his cat-scans to Thomas M. James, broken jaw bone - is the ugly truth not disclosed upon request by both Dr. defendants. This record with plaintiff's cat-scans by Quinter and a review by the medical community - by expert Doctor could explain Dr. Villanustre wilful disregard in mistreatment with out any real explanation of cause and effect after words is evidence which a jury would reasonably conclude that Dr. Villanustre is deliberately in - different towards plaintiff, and his medical needs, supra.

IV. Conclusion:

Dr. Villanustre's standards on deliberate indifference was one sided and did not cite the full and clear interpretation on deliberate indifference which can be found in policies of the corporation themselves are indifferent to findings in Parsons-v-Ryan, on delays with medical treatment with emergencies, urgent care. Dr. Villanustre was not only indifferent to time frames, but has been indifferent to the long standing effects this injury has caused plaintiff with his complicated and

-problematic effects [injury] has caused plaintiff that he will endure with the rest of his life.

therefore, Dr. Villanustre was deliberately indifferent to plaintiff's medical needs for an urgent and serious injury he failed to treat.

Respectfully Submitted on: January 8th, 2015.

Executed By: Thomas M. James

Thomas M. James, #98106

Plaintiff In Pro Per

Certificate of Service

I, Thomas M. James, #98106, hereby certify that the foregoing documents:

#1) Motion For Summary Judgment (Plaintiff)
response (6-pgs), and

#2) Brief In Support For Summary Judgment, Rule 56
Fed. R. Civ. Proc. (17-pgs) with certificate of Service
attached, and

#3) Appendix- Attachments #1 - threw - #6, (335 pgs),

were sent-out-via-legal-mail, postage prepaid from:
ASPC-Douglas, Gila Unit, P.O. Box 5003, Douglas, Az
85608, to:

Original Copy to:

Office of The Clerk of The Court, and

One copy to:

Hon. William T. Lawrence, Judge.

At: United States District Court

Southern District of Indiana

105 U.S. Courthouse, 46 E. Ohio St.

Indianapolis, Indiana 46204

one copy to:

Gerald B. Coleman

Attorney at Law

Coleman Stueson, L.L.P.

9101 Wesleyan Road

Suite 100

Indianapolis, Indiana 46268

Respectfully Submitted on: January 8th, 2015.

Executed By: Thomas M. James

Thomas M. James, #98106

Plaintiff In Pro Per